WRITTEN STATEMENT OF CHRISTOPHER HORNER, HEARING OF THE SENATE AND CONGRESSIONAL WESTERN CAUCUSES ON "THE WAR ON WESTERN JOBS"

JULY 13, 2010

Members of the Senate and Congressional Western Caucuses, thank you for the opportunity to address you this afternoon. My name is Christopher Horner. I am a Senior Fellow with the Competitive Enterprise Institute here in Washington, which is a classical liberal research, policy and advocacy organization with an emphasis on environment and energy policy.

I have worked on environment and energy policies for two decades. As an author two of my three books address environmental and energy policy. As an attorney I have been privileged to represent not only scientists and think tanks but Members of both the House and Senate.

As a policy analyst I have for years warned of the anti-liberty impacts of creeping -- and, now, sprinting -- policies grounded in claims of environmental protection, claims that now often appear to serve merely as a fashionable excuse for certain policy advocates to do what they've always wanted to do. These cautions include against efforts to impose the broader "global warming" agenda through vehicles other than the Kyoto treaty or cap-and-trade, specifically the Endangered Species Act, National Environmental Policy Act and Law of the Sea Treaty.[1]

Representing the Western United States the Members of this Caucus know better than most the insidious impact of ESA and NEPA, and have seen those threats have become reality in these past few years. We should also never lose sight of the fact that the Law of the Sea Treaty -- or LOST -- expressly governs and applies the precautionary principle to U.S. domestic transport and energy policies.[2]

Indeed, the same argument now being employed to block federal coal leasing could be used to block resource extraction under this treaty. Therefore what we are seeing done to the West through legislation, regulation and litigation will soon be done through treaty implementation, as well, in the event the Senate ratifies LOST.

The narrower issue I address today is the undeniable, renewed war being conducted on the American West through federal government policymaking, and through insufficient efforts by the executive branch to protect western communities against environmentalist assaults. These commissions and omissions threaten jobs, families, individual freedom and national security. They are compounded by additional legislative threats.

---

[1] See, e.g., "The Perils of 'Soft' and Unratified Treaty Commitments: The Emerging Campaign to Enforce U.S. Acknowledgements Made in and Under the Rio Treaty and Kyoto Protocol, Using the Vienna Convention, WTO, Alien Tort Statute, and NEPA", Competitive Enterprise Institute, December 1, 2003, expanding upon the discussion in “Modern Developments in the Treaty Process”, Christopher C. Horner (Federalist Society 2003).

[2] Article 207, "Pollution from land-based sources".

I discuss the land grabs and other means of locking up resources from development and production in my recent book "Power Grab". Today I will cite two particular areas. First is the renewed effort known colloquially as public land grabs, and the related campaign of wilderness and monument designations. Second is the proposed effort to vastly expand the reach of the federal regulatory state through what is known as the America's Commitment to Clean Water Act.

These policies are wrapped in the rhetoric of environmental protection but offered as key components of an ideological agenda much more grounded in control, and that cannot advance when sold on its merits. They will diminish freedoms and cost jobs throughout the country, inflicting particularly acute harm on the Western United States.

At a time of increasing, justifiable concern among the public about current economic prospects and their families' future, and the threat from ongoing and rapid piling-on of ever-more government and debt, adding these additional burdens on American communities seems not only unwise but recklessly ideological.

Land Grabs and Monument Designation

The modern poster child for politically motivated land grabs is designation of the Grand Staircase Escalante monument by the Clinton administration. This surprise announcement sealed off a tremendous source of "clean coal" by preempting possible mining from occurring.

Surely it was this prospect of resource development that prompted the designation. It is not by accident that such areas, also like ANWR, are described in almost mystical terms as pristine environmental jewels that must remain free of human involvement -- beyond romanticizing, that is -- no matter how remote or otherwise unremarkable, so long as they hold energy resources.

It seems we should expect more of the same in the near future. Recently, we saw the administration document styled "NOT FOR RELEASE" which confirmed that:

> The Obama administration is looking into bypassing Congress to designate millions of Western acres as national monuments... The document mentions 14 potential monument designations or expansions in nine states: Arizona, California, Colorado, Montana, New Mexico, Nevada, Oregon, Utah, and Washington. Republicans estimated the new designations could cover up to 13 million acres....The draft also mentions three tracts of land in Alaska and Wyoming -- states where the president's Antiquities Act authority is limited -- for potential non-monument conservation designations. It includes Alaska's Bristol Bay region, where environmental groups and salmon fishers have battled proposed energy and mineral development.[3]

[3] Patrick Reis, "Document shows Obama admin exploring 14 new monuments", E&E News, February 18, 2010.

National monument designations of this scope would surely have significant impacts on many western-based businesses, ranchers, outdoor enthusiasts, property rights activists, and other rural citizens.

The administration denies its intentions are as the document indicates, so I leave the matter without further comment, beyond expressing the hope that no surprise designations soon issue, and that the next Congress diligently exercises its oversight function as to where reality lies.

De Facto Land-Grabbing, and Opportunity Killing

I will not re-hash here the Interior Department's rush to lock up massive quantities of public of land from resource development even to the point of cancelling existing leases, or its accelerating efforts to use existing laws like the National Environmental Policy Act (NEPA) to block domestic energy production.

I do wish to note a related argument adding context to these actions, which will surely come as a surprise to most families dealing with budget pinches, inflicted at the pump and the mailbox when gasoline and electricity prices rise: this administration has on at least two occasions informed Congress that our tax code encourages "overproduction" of domestic energy.

To remedy this perceived overproduction of domestic energy resources, the administration has turned to various tools, at least one of which was recently found legally wanting by the U.S. District Court for the Eastern District of Louisiana. Consider the following language from Judge Martin Feldman's opinion enjoining the administration's moratorium on deepwater offshore drilling, because the factors he cites apply to Western communities under assault by this resumed war against their prosperity and freedoms:

> [T]he Court is persuaded that it is only a matter of time before more business and jobs and livelihoods will be lost. The defendants trivialize such losses by characterizing them as merely a small percentage of the drilling rigs affected, but it does not follow that this will somehow reduce the convincing harm suffered....
>
> The effect on employment, jobs, loss of domestic energy supplies caused by the moratorium as the plaintiffs (and other suppliers, and the rigs themselves) lose business, and the movement of the rigs to other sites around the world will clearly ripple throughout the economy in this region...
>
> An invalid agency decision to suspend drilling of wells in depths of over 500 feet simply cannot justify the immeasurable effect on the plaintiffs, the local economy, the Gulf

region, and the critical present-day aspect of the availability of domestic energy in this country.[4]

The same perspective applies to other, non-energy resource production, nationally and to the communities that rely upon it or see their future economic opportunity in resource development.

The same mindset -- that resource production almost inherently amounts to overproduction -- also applies across the various resources whose domestic production the administration seeks to stifle. And the administration's hurry to halt resource production has indeed struck far more broadly than at energy resources, harming a diverse array of communities depending upon responsible production of all manner of resources for their existence.

For example, the administration and its congressional allies sought to discourage politically disfavored uses of the land, by reviving efforts to snuff out marginally profitable domestic mining operations by stripping them of the ability to depreciate their asset for tax purposes.

We have also seen in recent months evidence that the U.S. is increasingly dependent on foreign sources of minerals of all manner, including rare earth components of technologies demanded, with rich irony, by the same set insisting that we not produce resources domestically.[5] That this like the rest of their agenda is now often promoted in the name of national security is risible.

Specific economic impacts are largely left to model projections, but we do know that various states on the Atlantic seaboard estimate tens of thousands of jobs each to flow from commencing offshore resource development. Historically the Gulf Coast regional economy has been driven by resource development and, onshore, Louisiana and Pennsylvania have each already added tens of thousands of jobs from pursuing shale gas. The West has experienced booms in recent past decades when policies, unlike today's, encouraged responsible resource development.

So we are confronting jobs lost through opportunity cost by deferring hydrocarbon production in favor of (mostly hypothetical) windmill and solar development. Those projects actually proposed are often stalled not only by economics and the stubborn laws of physics but, again quite ironically, by the same green groups who insist we swear off that which works -- hydrocarbons -- in favor of that which will never satisfy reasonable, realistic needs. But we also see actual job loss in communities being denied the opportunity to responsibly produce resources, on both federal and private lands.

Administration's War on the West Dovetails with its Supporters' Campaigns

The truth is that the green movement whose worldview and agenda the current administration shares has fought “renewable” plants as aggressively as they have conventional sources that

[4] Order, U.S. District Court for the District of Eastern Louisiana, Case 2:10-cv-01663-MLCF-JCW Document 67 Filed 06/22/10 (Judge Martin Feldman).
[5] Release, "Technical Announcement: U.S. Minerals Sector Declined in 2009", United States Geological Survey, February 16, 20010, http://www.usgs.gov/newsroom/article.asp?ID=2404.

work. As Bill Kovacs will certainly note today, the U.S. Chamber has identified more than 380 such projects blocked or stalled over approximately the past five years which, combined, total more than $560 billion in lost economic activity and approximately 250,000 direct jobs lost.

Of these blocked projects, 167 were "renewables," bigger by a third than the next closest target, coal projects.[6] These include gas and renewable projects blocked in California and Oregon, coal blocked in Montana, Oklahoma and Arizona, and a mix of all such projects blocked throughout the West (and indeed throughout the country).

Anecdotes abound from various other contexts. A colleague whose family still produces resources on their lands in Oregon has detailed for me one example of the explosion in the regulatory state chasing local businesses out of operation. This involves EPA's (recently delayed) mercury proposal threatening to shut a major employer in Baker County, Oregon, for at best negligible marginal environmental gain.

The Ash Grove Cement plant in Durkee is spending $20 million to cut emissions by 80%, but EPA has proposed a 90% cut. So the regulators are likely to promote limits that will shut down the faility, which with the shutdown of logging on the Wallowa Whitman National Forest and the closure of Baker's sawmill and plywood mill is now the single biggest employer and taxpayer in the county.[7] That is, besides the school district and the Forest Service—whose staff has ballooned as timber production has ended.

Also under President Obama we saw a refusal to ease enforcement of the heartless, at-whatever-the-cost ESA provisions to aid California farmers being denied water in the name of a fish. War has been declared on Appalachian coal mining in the name of a bug, the Mayfly, that lives mere hours. President Bush's attempts at creating a less restrictive roadless rule for national forests also was bounced, plus a cascade of many more decisions revealing a radical view of people, nature and public resource management.

The administration immediately waved the "spotted owl" flag upon taking office, cancelling a Bush-era logging rule on the grounds that allowing the continued timber harvesting violates the Endangered Species Act. This struck a quick blow to small Oregon towns far more vulnerable to a downturn in a particular industry than, for example, a Chicago suburb.

The Interior Department's lead on the issue, assistant secretary for fish and wildlife and parks Tom Strickland, said that such public forest management decisions are an opportunity to sequester more carbon. Indeed, the administration speaks in terms of forests as "our carbon sinks," seemingly oblivious to the role that resource production plays not only in Western communities but the broader economy.

---

[6] As of January of this year the breakdown was 167 renewable projects, 129 coal, 41 natural gas, 24 transmission, and 20 nuclear.

[7] See, e.g., "Ash Grove's mercury wait continues", Baker City Herald, June 4, 2010, http://www.bakercityherald.com/Local-News/Ash-Groves-mercury-wait-continues.

It is this mindset that enables the suite of policies harming families and devastating communities.

Under President Obama we also saw suspension of mineral claims in Arizona in the coded name of "further study" into environmental impacts, gravel mine expansion halted in the Puget Sound area, and permits for Alaska gold and copper operations immediately come under fire.

These actions also often amount, in essence, to a regulatory taking placing the states and counties in a very difficult situation regarding future tax revenues as well as payment to the landowners for loss of the use of their mineral or other resource estate.

Courting Disaster

The administration also must decide whether and how aggressively to defend against green group litigation, and whether and how to appeal if they lose. Recent high-profile instances, involving state-passed immigration legislation and civil rights litigation and oversight, have reminded Americans of the discretion involved within and in employing the Department of Justice. Such discretion is equally at issue in the matter we are discussing today.

The prospect of ideological influence on such decisions is even more troubling knowing the often radical appointees' ideological sympathy with green groups dedicated to using whatever law may work to shut down politically disfavored economic activity. Their current favorite is to try and stop the activity by tying it directly or indirectly to claims of global warming, which means energy use, and energy resource production.

Consider how pressure groups including WildEarth Guardians are pursuing several actions to dramatically scale back federal coal leasing in the Powder River Basin (PRB). The Federal Government is by far the largest owner of coal reserves in the U.S., with about one-third of our total reserves; a recent assessment by the U.S. Energy Information Administration (EIA) asserts that PRB alone contains over 200 billion short tons of coal, and currently supplies more than 450 million tons of coal per year used to produce electricity in 38 states.

If these groups are successful they could potentially limit all federal coal leasing in the U.S. In the name of global warming the group is engaging in a multi-pronged effort to delay or stop federal coal leasing in the PRB.[8]

A similar action against federal oil and gas leasing in Montana produced a settlement agreement resulting in the Department of the Interior cancelling 61 oil and gas leases covering over 30,000 acres and suspending all future oil and gas leasing in Montana, North and South Dakota while the agency studies alleged climate change impacts. Already, environmental group protests

[8] The economic impacts of a diminishing federal coal will extend far beyond the mines. According to the National Mining Association, PRB coal producers alone spent more than $2.27 billion on supplies in 2008, PRB coal freight expenses exceeded $200 million that same year. Add to this the half of the economy that relies on affordable energy from abundant domestic resources to compete with low-cost producers and you see these groups intend to have a terrific impact on our country.

against oil and gas leases in Wyoming have ensured that only 5 percent of the leases sold since mid 2008 have been issued, according to the National Mining Association.

The threat of "sweetheart settlements" -- whereby the taxpayer's interests are bargained away with a wink and a nod to ideological Doppelgangers -- is real. How far these sympathies will extend into federal litigation decisions is a serious concern given the emergence of new vehicles for the environmental industry such as the Center for Biological Diversity (CBD). CBD is the group that managed to convince the Fish & Wildlife Service, with the assistance of the courts, to list the proliferating polar bear as a threatened species under the rigid ESA.

CBD is famous for vowing to "halt" -- note the word choice -- *halt* domestic greenhouse gas production, which not only means use of energy sources that keep us free, prosperous, safe and indeed alive, but activities such as logging that release CO2 by necessity because, of course, trees do not hold all of the carbon nutrient once felled. CBD opened a new Climate Law Institute (CLI) to "use existing laws and work to establish new state and federal laws that will eliminate energy generation by the burning of fossil fuels — particularly coal and oil shale." With a friendly administration, the project's "initial $17 million" will go that much further.

Expansion of the Clean Water Act to Non-navigable Waters

Among the tools used to regulate various economic activities, including surface mining, is the Clean Water Act's "wetlands" provision, extended over decades to the point of absurdity by activist bureaucrats, green groups and courts. Now, the environmentalist establishment seeks a crowning achievement, enabling full-blown abuse of the Clean Water Act.

From almost the moment of CWA's 1972 adoption its principal limitation, of applying to "navigable" water, was decreasingly respected. Two recent Supreme Court decisions have restored some sanity to this grandest of all regulatory overreaches. These were the 2001 *SWANCC* and 2006 *Rapanos* opinions limiting CWA's reach in a way consistent with the legislation's plain language, to navigable waters (and waters significantly linked to such bodies of water) as opposed to all wetlands, lakes and streams of the United States.

This judicial return to reading the law as written has prompted some in Congress to try and enact sweeping legislation, specifically the America's Commitment to Clean Water Act (H.R. 5088). This bill's key objective is to formally strike the statutory "navigable waterways" limit, while including other expansions that together massively increase federal government authority.

The Waters Advocacy Coalition (WAC) states that the bill would "result[] in an expansion of federal authority to virtually all waters in the United States, unnecessarily encroaching on private property and state and local authority. It will create legal and regulatory uncertainties that will undermine economic activity and jeopardize environmental progress", by jeopardizing property rights and individual liberties. We know this if for no other reason than the way the CWA was abused prior to the Court reining in regulatory and earlier judicial overreach.

The bill supplants historical congressional judgment with language drafted by regulators, which language the Court struck down as impermissibly expanding the statute's grant of authority. This is not only perverse, if by now typically so, but arguably seeks to federalize every puddle in the country such that ranchers' ponds might soon be under federal jurisdiction -- along with his uses of the pond -- even if to the untrained or insufficiently ideological or bureaucratic eye the water does not seem to be attached to the waters of the United States.

Removing the word "navigable" also raises serious questions about how other key terms in the Clean Water Act will be implemented, such as “tributary” and “adjacent.” The future consequences of such moves are of course unknowable, but the prospect is not encouraging given the history of interpreting the Act's terms so overly broadly, a history which the courts will surely resume upon enactment of any legislation remotely resembling H.R. 5088.

But the bill does more than this. As WAC also notes, among the ACCWA's other problems is that "It expands the current definition to include 'international waters' (not just the 'territorial seas') and 'adjacent waters' (not just adjacent wetlands) and removes language of limitation in the current regulatory definition."

If EPA obtains authority over all waterways, viewed so broadly, this will invite the Agency to regulate activities with purely local (intrastate) consequences. The desired reach is desired for a reason, and that reason is to slow and stop surface resource production, particularly coal.[9] In response to insistence that this is not the regulators' intent, then what, specifically, is the intent? To date, we only hear vague balm of "preserving integrity" of waters and "avoiding pollution".

We should ask about the Commitment to Clean Water Act -- is there any evidence that water quality has declined since the Supreme Court held in its SWANCC opinion that "waters of the United States" is **not** a roving license to regulate **any** water in the United States? If there's no evidence, there's no substantive reason to expand the reach of the CWA.

Experience reminds us of the warping of congressional intent by the courts, and the unreality of expecting Congress to then correct such perversion. This legislative effort clearly is a prescription for more such overreach, and governmental abuses of private property rights.

[9] I detail in "Power Grab" the mentality, shared by senior officials of the current administration, that surface mining in particular must be brought down. Environmentalists have already perfected the use of Section 404 of the CWA, the “wetlands” provision, to engage the U.S. Army Corps of Engineers to block surface mining, and then bleed the industry through the Mine Safety and Health Administration (MSHA) to block activity if they try to go underground. As an aside, if an important one, raises the topical subject of how this environmental mindset drives miners underground and oil and gas drilling offshore, both inherently riskier enterprises than extracting our abundant, if increasingly unavailable, resources on or under dry land.

Conclusion

There is a renewed War on the West. It is being waged every day by the Obama Administration, its radical appointees and its supporters all driven to "fundamentally transform" America. This includes an agenda designed to suffocate domestic resource production by the country which sits on the world's largest energy supplies, perversely in the name of national security now that the public has openly revolted against the "global warming" agenda and its "cap-and-trade" scheme.

The War on the West is a microcosm of the modern environmentalist movement, whose adherents now control the levers of power and which is committed to "bankrupt[ing]" America's coal industry and causing "electricity rates [to] necessarily skyrocket", both according to our president. It is the work of those who have left "oil companies ... drilling a mile beneath the surface of the ocean" not, as the president also recently claimed, "because we're running out of places to drill on land and in shallow water", but because this movement has sealed the least costly, least risky supplies off limits.

This campaign by definition steals individuals' freedoms by expanding the role, size, cost and authority of the federal government at the expense of their economic opportunities, their wealth, and their private property rights. It leaves Americans less rich, less free, and less safe.

Whatever and however realistic the motivation(s) for this campaign, if it continues its incremental successes in the executive, legislative and judicial branches of government it will have terrible employment and other economic impacts, direct and indirect, throughout the country but with particularly acute impacts in resource-rich regions such as the West.

This hearing is a step toward creating a more balanced debate and, hopefully, far less imbalanced energy and other resource policies. I thank the Members here today for your efforts, and for the opportunity to speak today.